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January 13, 2010

**Ex Parte**

Ms. Marlene Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

**Re: *Nebraska Public Service Commission and Kansas Corporation Commission Petition for Declaratory Ruling or, in the Alternative, Adoption of Rule Declaring that State Universal Service Funds May Assess Nomadic VoIP Intrastate Revenues, WC Docket 06-122 (filed July 16, 2009)***

Dear Ms. Dortch:

Vonage Holdings Corp. (“Vonage”) hereby responds to a recent filing by Verizon urging the Commission to address the above-captioned Petition in generic rulemaking proceedings.<sup>1</sup> Vonage agrees that Verizon’s suggested approach would be both lawful and appropriate. Like the alternative relief requested by Petitioners – adoption of a rule that allows states to assess state universal service on nomadic VoIP providers – a generic rulemaking would ensure that any change in the scope of the *Vonage Preemption Order* would not undermine the Commission’s successful policy for VoIP services or the Commission’s future ability to adopt a single national policy when appropriate.

Verizon also suggests that the Commission could grant the Petition by acting “narrowly,” and “drawing the clear distinction between what the Commission has already preempted in the Vonage Order and a state’s authority to tax VoIP providers to fund a state universal service program.”<sup>2</sup> This approach, however, is precluded by the clear language of the *Vonage Preemption Order* and the settled principal that universal service assessments are not taxes.

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<sup>1</sup> Letter from Brian F. Rice, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket 06-122 (filed Dec. 18, 2009).

<sup>2</sup> *Id.*

As Vonage has repeatedly explained, and as federal courts have repeatedly agreed, the *Vonage Preemption Order* preempts state universal service assessments on providers like Vonage.<sup>3</sup> The language of the *Order* is clear on this point. *First*, the *Order* preempts “traditional ‘telephone company’ regulations.”<sup>4</sup> *Second*, the *Order* confirms the obvious – universal service obligations are traditional telephone company regulations – by specifically preempting application of the Minnesota statute that would have required Vonage to contribute to Minnesota’s universal service program.<sup>5</sup> *Third*, the *Order* does not include universal service in its enumeration of areas of state regulation that are not preempted: “laws concerning taxation; fraud; general commercial dealings; and marketing, advertising, and other business practices.”<sup>6</sup>

Verizon seems to suggest that the Commission could ignore the clear language of the *Vonage Preemption Order* by calling state universal service obligations taxes. But the Fifth Circuit, in *Texas Office of Public Utility Counsel*, considered and rejected the argument that universal service assessments are taxes.<sup>7</sup> Indeed, as *TOPUC* makes clear, if universal service assessments were taxes, the Commission’s authority to impose and collect those assessments would be called into grave doubt.<sup>8</sup> Verizon’s suggestion that the Commission now reverse course and call universal service a tax merely demonstrates, once again, the substantial and unnecessary risks of addressing the Petition in any proceeding other than a rulemaking.

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<sup>3</sup> See, e.g., *Vonage Holdings Corp. v. Neb. Pub. Serv. Comm’n*, 564 F.3d 900 (8th Cir. 2009), *aff’d* 543 F. Supp. 2d 1062 (D. Neb. 2008); *N.M. Pub. Regulation Comm’n v. Vonage Holdings Corp.*, Memorandum Opinion and Order, 640 F. Supp. 2d 1359 (D.N.M. July 28, 2009); *Vonage Holdings Corp. v. N.Y. State Pub. Serv. Comm’n*, No. 04 Civ. 4306 (DFE), 2005 U.S. Dist. LEXIS 33121 (S.D.N.Y. Dec. 14, 2005); *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm’n*, 394 F.3d 568 (8th Cir. 2004), *aff’d* 290 F. Supp. 2d 993 (D. Minn. 2003).

<sup>4</sup> *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd 22404 ¶ 1 (2004) (“*Vonage Preemption Order*”).

<sup>5</sup> *Id.* at 22408-09 ¶ 10.

<sup>6</sup> *Id.* at 22405 ¶ 1.

<sup>7</sup> *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 426-428 (5th Cir. 1999) (“*TOPUC*”).

<sup>8</sup> *Id.*

If you have any questions or require any additional information, please do not hesitate to contact me at (202) 730-1346.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'BDS', with a long horizontal line extending to the right.

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